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Supreme Court of the United States

No. 614

OCTOBER TERM, 1963

VINCENT IGLESIAS ARMADA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	12
APPENDIX A — OPINION BELOW	App. 1
APPENDIX B — JUDGMENT OF AFFIRMANCE, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT	App. 13
APPENDIX C — ORDER DENYING PETITION FOR REHEARING	App. 15

AUTHORITIES

Cases	Page
Brinegar v. *United States*, 338 U.S. 160	12
Carroll v. *United States*, 267 U.S. 132	11
Jones v. *United States*, 362 U.S. 257	7
McDonald v. *United States*, 335 U.S. 451	10
Nardone v. *United States*, 308 U.S. 338, 341	8
Rea v. *United States*, 350 U.S. 214	10
Rent v. *United States*, 5th Cir., 209 F.2d 893	12
Shurman v. *United States*, 5th Cir., 219 F.2d 282	12
Silverthorne Lumber Co. v. *U. S.*, 251 U.S. 385, 392	8
United States v. *Di Re*, 332 U.S. 581	12
United States v. *Janitz*, D.C. N.J., 6 F.R.D. 1	11
United States v. *Jeffers*, 342 U.S. 48	8
United States v. *Stoffey*, 7th Cir., 279 F.2d 924	12

Federal Statutes

Rule 41 (e), Federal Rules of Criminal Procedure	3, 8

Constitutional Provisions

Amendment IV, United States Constitution	2

Miscellaneous

58 Yale L.J., 144, 158 (1948)	9, 10

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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, VINCENT IGLESIAS ARMADA, respectfully prays that a writ of certiorari issue to review the judgment below of the United States Court of Appeals for the Fifth Circuit. This judgment affirms petitioner's conviction on four counts charging crimes in connection with the purchase, concealment and transportation of drugs in violation of 26 U.S.C.A. §4704(a) and 21 U.S.C.A. §174, and of conspiracy to commit such crimes in violation of 21 U.S.C.A. 174.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit has not as yet been reported but is set forth in Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment below was entered on July 10, 1963 (R. 148) and is attached as Appendix B. A petition for rehearing was filed on August 30, 1963 and denied on September 12, 1963 (R. 170). The Order denying petition for rehearing is attached as Appendix C. By Order Extending Time to File Petition for Writ of Certiorari dated October 7, 1963, Justice Hugo L. Black ordered that the time for filing a petition for writ of certiorari in this cause be extended to and including November 11, 1963.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this case are as follows:

1. Fourth Amendment to the Constitution of the United States:

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be vio-

lated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

1. Rule 41 (e):

"Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, . . .

" . . . The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. . . . "

QUESTIONS PRESENTED

1. WHERE AN INDICTMENT CHARGES TWO DEFENDANTS JOINTLY WITH THE ILLEGAL PURCHASING, CONCEALING AND FACILITATING TRANSPORTATION OF NARCOTICS, AND WITH CONSPIRACY TO COMMIT SUCH CRIMES,

DOES ONE DEFENDANT HAVE SUFFICIENT STANDING TO OBJECT TO THE ADMISSION OF EVIDENCE PROCURED BY AN ILLEGAL SEARCH OF A CO-DEFENDANT'S HOTEL ROOM WHERE EVIDENCE OBTAINED BY SUCH ILLEGAL SEARCH IS RELIED UPON BY THE GOVERNMENT TO ESTABLISH PROBABLE CAUSE FOR A SUBSEQUENT SEARCH OF DEFENDANT'S AUTOMOBILE.

2. SHOULD EVIDENCE OBTAINED BY FEDERAL AGENTS AS A RESULT OF A WARRANTLESS SEARCH OF A DEFENDANT'S AUTOMOBILE BE EXCLUDED UPON MOTION OF SUCH DEFENDANT WHERE THE PROBABLE CAUSE RELIED UPON TO JUSTIFY SUCH SEARCH WAS OBTAINED BY SUCH AGENTS IN A PRIOR ILLEGAL SEARCH OF A CO-DEFENDANT'S HOTEL ROOM.

3. MAY FEDERAL AGENTS SEARCH AN AUTOMOBILE SUSPECTED OF CARRYING CONTRABAND NARCOTICS WITHOUT FIRST OBTAINING A WARRANT WHERE THE AGENTS HAVE THE DESCRIPTION AND LICENSE NUMBER OF THE AUTOMOBILE APPROXIMATELY ONE HOUR BEFORE THE SEARCH, WHERE THE AUTOMOBILE WHEN LOCATED IS UNOCCUPIED AND THE KEYS IN THE POSSESSION OF THE

DEFENDANT APPROXIMATELY 35 FEET AWAY AND WHERE PRIOR TO THE SEARCH THE AGENTS IN EFFECT RENDERED THE DEFENDANT UNABLE TO DRIVE AWAY.

STATEMENT OF THE CASE

Petitioner and a woman named Hilda Nora Bostizano were jointly indicted for crimes in connection with narcotics. Bostizano failed to appear for trial, her bond was forfeited and petitioner was tried alone. He was found guilty under four counts which charged (1) that he and Bostizano concealed the drugs in violation of 21 U.S.C.A. §174; (2) that they facilitated transportation of the drugs in violation of 21 U.S.C.A. §174; (3) that they purchased the drugs in violation of 26 U.S.C.A. 4704 (a); and (4) that they conspired to commit such crimes in violation of 21 U.S.C.A. §174.

On July 15, 1961 U. S. Customs Agent Knierin received a call from the Customs Inspector at the Miami International Airport that a suspect, Hilda Nora Bostizano, was in the baggage examination room. Bostizano subsequently left the baggage examination room and was located by Agent Knierin and Fickie at Room 609 of the Everglades Hotel at 11:30 P.M. on July 15, 1961. The two agents took a room across the hall from Bostizano's room. On the following day, July 16, 1961, the two agents, without a search warrant, entered Bostizano's room in her absence and during the search discovered two bags containing white crystalline powd[illegible] in the false bottom of a suitcase. The false bottom of the suitcase was replaced by the agents after their discovery and the suitcase left in

the room. The information obtained by the search was conveyed to Agents Romano and Doughney.

On Monday, July 17, 1961, employees of the hotel assisted Bostizano in removing her baggage from her room and the doorman saw the petitioner place the suitcase in the trunk of his car. After the car pulled out the doorman had a conversation with Agent Doughney and gave him a notation of the make of car and license number. At 11:00 A.M. the agent called the police department and put in an "all points bulletin" on the car. About one hour later petitioner again drove into the circular drive of the Everglades Hotel, parked the car and alighted. The doorman informed the agents, "here comes your party now". Petitioner was accosted by Agent Romano who advised him he was a federal officer and told him, "don't you move. Just open the car. Let's see the suitcase and stay there and don't move and nobody gets hurt". Petitioner was approximately 30-35 feet from the car when accosted. Petitioner opened the trunk of the car and Agents Romano and Doughney made an examination of the suitcases without finding the narcotics. Agents Fickie and Knierin then came to the car, the truck lid was again lifted and Agent Fickie located the false bottom in the suitcase and the two bags with white substance, later identified at the trial as cocaine. Petitioner was then placed under arrest.

The petitioner moved to suppress the evidence obtained as a result of the search of his automobile. During the hearing upon such motion petitioner objected to and moved to strike the evidence with regard to the search of Bostizano's room, which motion was overruled (R. 111-113). The motion to suppress was denied and the jury

subsequently found the petitioner guilty on the four counts as hereinabove set forth.

Petitioner appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed his conviction holding that petitioner had no standing to question the legality of the search of Mrs. Bostizano's hotel room and further that it was reasonable for the Customs Agents to search the automobile without a search warrant based on probable cause to believe that the automobile contained narcotics subject to seizure and destruction. The affirming opinion is attached hereto as Appendix A.

The present petition is directed to this affirming opinion.

REASONS FOR GRANTING THE WRIT

1. The decision below is in probable conflict with this Court's decision in *Jones v. United States, 362 U.S. 257.*

The Fifth Circuit in the decision below held:

> "The search of Mrs. Bostizano's hotel room in which the cocaine was first discovered was not an invasion of Armada's privacy. He has no standing to raise and does not in fact question the legality of that search. See Jones v. United States, 1960, 362 U.S. 257, 261, et seq."

An invasion of petitioner's privacy is not the sole basis upon which petitioner may object to the search of Bostizano's room. This Court in *Jones v. United States,*

supra, recognized that ownership or possession of the property involved established "standing" as an aggrieved person under Rule 41(e) of the Federal Rules of Criminal Procedure. This Court further recognized that where, as in the instance case, ". . . the indictment itself charges possession, the defendant in a very real sense is revealed as a 'person aggrieved by an unlawful search and seizure' . . . ". It is true that no property was seized in the illegal search of Bostizano's room, but the knowledge gained by the Government's own wrong cannot be used by it simply because it is used derivatively. *Nardone v. United States, 308 U.S. 338, 341; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392.* Without the use of the evidence obtained by the illegal search of Bostizano's room and the discovery of the cocaine which the government subsequently charged petitioner with possessing and with conspiracy with respect to such possession, there was no probable cause for the subsequent search of petitioner's automobile. If the cocaine had been seized during the search of Bostizano's room and petitioner charged as in the indictment, there would be no question as to petitioner's right to have such evidence suppressed. *Jones v. United States, supra; United States v. Jeffers, 342 U. S. 48.* The fact that the evidence obtained was used derivatively rather than directly does not lessen petitioner's rights under the Fourth Amendment. The petitioner's rights in the property were established by the allegations of the indictment as to concealment, purchase and transportation on or about July 17, 1961 and as to conspiracy to commit such crimes on or about July 15, 1961 and continuing through July 7, 1961. Under the law of *Jones v. United States, supra*, petitioner was an aggrieved person under Rule 41(e) and the Fourth Amendment and was

entitled to have the evidence as to the search of Bostizano's room stricken upon his motion.

2. The petition should be granted to consider questions of importance in the exercise of this Court's supervisory power over federal law enforcement.

The opinion sought to be reviewed sanctions the use of evidence obtained by an illegal search of one person's premises to establish probable cause for a subsequent search of petitioner's automobile. Such a procedure should be condemned by this Court under its supervisory power over federal law enforcement, entirely independently of any considerations of petitioner's rights under the Fourth Amendment to object to the original search. This Court has adopted the exclusionary rule as a means of protecting all persons against official invasion of privacy and the security of property. To now sanction a rule that the fruits of an illegal search may be used with impunity against a third person would make every household subject to illegal search. The police will know that " . . . they may rummage everywhere for evidence concerning a suspect except among his belongings or in his house. No motion to suppress at the trial stage need be feared, there being no one who can successfully make the motion." See Judicial Control of Illegal Search and Seizure, 58 Yale L. J. 144, 158 (1948).

Silverthorne Lumber Co. v. United States 251 U. S. 385, states that,

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all."

This rule must be applied even when asserted by one whose premises were not originally searched, if the tainted fruits of the illegal search are sought to be used against him. What was said in a different context in *Rea v. United States, 350 U. S. 214,* at pages 217-218 is applicable here:

> "The obligation of the federal agent is to obey the Rules. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings."

3. The petition should be granted to consider questions of importance in the administration of justice in the federal courts.

The petitioner was required to go to trial without his co-edefendant and alleged co-conspirator Bostizano. If Bostizano had been present and moved to suppress the evidence of the search of her room such motion would clearly have been granted. Such evidence would not have been admissible against the petitioner. Compare *McDonald v. United States, 335 U. S. 451.* The rights of the petitioner to the exclusion of such evidence should not depend upon the fortuitous circumstance of whether the co-defendant appears or not. As stated in Judicial Control of Illegal Search and Seizure, 58 Yale L.J. 144, 158 (1948):

> "The illogic of limiting the exclusionary protection to the 'aggrieved' party appears in a pattern of inequitable decisions. 'Where, for example, a conspiracy exists in which one member of a gang owns property used by all, the owner, frequently the master criminal, may go free, while his helpers are punished."

See also Annotation 96 L. Ed. at pages 76-77.

To afford the utmost protection of the benefits of the Fourth Amendment and Rule 41(e), the Rule should be interpreted and applied by Federal Courts as a restriction on the power of the court to permit the introduction of tainted evidence under any circumstances. As stated in *United States v. Janitz*, D.C. N.J., 6 F.R.D. 1:

> ". . . if the government through its agents and without justification carried away, or seized property unlawfully, it cannot be and ought not to be permitted in justice or sound reason to gain any advantage whatever from such illegal conduct. . . .".

4. The decision below is in probable conflict with this Court's decision in *Carroll v. United States*, 267 U. S. 132.

The Fifth Circuit held that the search of petitioner's automobile was justified under the rule of *Carroll v. United States*, *supra*. The petitioner urges that the rule of *Carroll* is strictly limited to searches of a vehicle in a state of mobility. Under the circumstances of the present case it is not possible to say that petitioner's automobile

was mobile. Defendant's automobile was no more "likely to be disturbed" than was the automobile in *United States v. Stoffey, 7th Cir., 279 F. 2d 924; Shurman v. United States, 5th Cir., 219 F. 2d 282; and Rent v. United States, 5th Cir., 209 F. 2d 893.* To extend the rule of *Carroll* to automobiles not in a state of mobility is to authorize searches of automobiles under conditions never sanctioned by this Court in *Carroll* or other decisions. See also *United States v. Di Re 332 U. S. 581; Brinegar v. United States, 338 U. S. 160.*

5. The federal decision below is clearly wrong and unjustly convicts the petitioner in this federal criminal prosecution.

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petition for Writ of Certiorari was mailed to the Solicitor General, Department of Justice, Washington, D. C. this _____ day of November, 1963 by depositing the same in a United States post office with air mail postage prepaid and addressed to the Solicitor General, Department of Justice, Washington, D. C.

I FURTHER CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was mailed to the office of the United States Attorney for the Southern District of Florida, Federal Building, Miami, Florida, this _____ day of November, 1963.

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19596

VINCENT IGLESIAS ARMADA,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(July 10, 1963.)

Before RIVES, LEWIS* and BELL, Circuit Judges.

RIVES, Circuit Judge: Armada and a woman named Hilda Nora Bostizano were jointly indicted for crimes in connection with a large quantity of cocaine, "in excess of four pounds." Bostizano failed to appear for trial, her bail bond was forfeited, and Armada was tried alone. He was adjudged guilty on a jury's verdict under

* Of the Tenth Circuit, sitting by designation.

four counts, which charged respectively: that he and Bostizano concealed the drugs in violation of 21 U.S.C.A. §174; that they facilitated the transportation of the drugs in violation of 21 U.S.C.A. §174; that they purchased the drugs in violation of 21 U.S.C.A. §4704(a); and that they conspired between themselves and with other persons unknown to commit such crimes in violation of 21 U.S.C.A. §174. Armada was sentenced to imprisonment for five years on each count, sentences to run concurrently, and was fined $2,500.00 on each count.

The cocaine was seized as a result of a search of Armada's automobile. The only question presented on appeal is whether the district court erred in denying Armada's motion to suppress this evidence as being unlawfully obtained in violation of the Fourth Amendment to the Constitution.

At between 9:30 and 9:50 on Saturday evening, July 15, 1961, two days before the search of Armada's car, United States Customs Agent William J. Knierin had a phone call at his home from the Supervisory Customs Inspector on duty at the customs enclosure at the Miami International Airport, Miami, Florida, who told him that a suspect, Hilda Nora Bostizano, a known associate of Armada, was in the baggage examination room. Agent Knierin testified on the motion to suppress:

> " . . . . At that time I asked him, 'Is she still there? Has she come down from Immigration yet?' And he said, 'Well, I don't know. We got

the call late.' And I said, 'I will have to look through the deal (sic) letter file.' And told him, 'You had better find out if she is still there and you had better give me a call.' So ten minutes later, I would say Mr. Lunderville gave me another call and he told me that the suspect was gone and that she had left the baggage examination room and that the inspector had missed the notification that she was a suspect and that the suspect was on the street."

Knierin and another Customs Agent, William D. Fickie, then proceeded to the office of the United States Customs Agent in the Post Office and examined the existing file involving Armada and Bostizano, and by 11:30 P.M. they had located Bostizano in Room 609 of the Everglades Hotel. The two agents took Room 623, diagonally across the hall from Bostizano's room, and thereafter maintained a surveillance on the hotel lobby and room.

At about 3:30 or 4:00 o'clock on Sunday afternoon, July 16, 1961, these two agents, without a search warrant, entered Bostizano's hotel room and observed two bags or suitcases, which Knierin opened. Both were apparently empty. The smaller bag had a distinct odor of fresh glue, and a close examination revealed a more than normal thickness at the bottom. Knierin further testified:

". . . . So therefore, I attempted to pull first at the upper left hand corner of this bag—the

bottom or what looked like to be the bottom of the bag. I gave it a slight jerk. Then I went to the lower right hand corner of the bag and tugged a little bit there. And after this slight tug the whole bottom came up revealing two bags, plastic bags, which fitted into the bottom of this suitcase. These two bags contained a white fluffy shiny sort of crystaline powder."

On the basis of his prior training and experience, Knierin formed an opinion that this substance was cocaine. Continuing, Knierin testified:

"A. Next I took a bottle of glue out of my pocket and I put glue around the pieces of fabric covering, this hard piece of cardboard that was the false bottom, and I glued the fabric back to the false bottom.

"Q. Now, subsequently did you discuss what you had seen in these suitcases with any of the other agents?

"A. Yes, sir. I discussed it immediately with Mr. Fickie, of course, and shortly later that afternoon, in view of the fact that it was dragging on, we called in Agent Romano and Agent Romano and I stayed in the room together and I discussed what I had found in the suitcase and other information that I had derived from the reading (sic) the file with Agent Romano.

"Q. Did you ever discuss this with Agent Doughney, that you recall?

"A. In a small manner. Yes, I told him what was in the suitcases, what I had seen and what I thought was in the suitcases. I told him a little bit about Mr. Armada's background, but that was not on a large scale."

As to information conveyed to Agent Romano, he further testified:

"I told him that ~~Hilda~~ Nora Bostizano was placed on the suspect list only because of association in South America with dealers who produced cocaine and with Vincent Iglesias Armada. I told Mr. Romano that Mr. Armada had been on the suspect list for six or seven years and we suspected him of dealing in cocaine and bringing it up in false bottom suitcases usually and mostly with women couriers.

"By Mr. Pearson:

"Q. Do you remember discussing this with Mr. Doughney?

"A. I discussed it with Mr. Doughney but not near in length that I went into it with Mr. Romano."

When Knierin testified that he had no search warrant or other process authorizing him to search Bostizano's hotel room, Armada's attorney entered the following objection:

"Mr. Carr:

"Now, Your Honor, I realize that legally I cannot object to a search—on behalf of Mr. Armada—unless he claims a proprietary in-

terest in that room, which, of course, we say he does not claim. But here again we submit to the Court that a request for postponement was made on the basis that we would prefer to be tried in company with the Bostizano woman who, if present, could undoubtedly make a legal objection to the admission of this testimony. But if such a ground be not available to the defendant, Armada, at least the grounds that the search of the room of a defendant not present and not on trial and not shown to be in privity with the defendant Armada is irrelevant and immaterial, and there must be some manner of objection that would be available to Armada. And I submit that I am justified in the position which I take by virtue of the testimony of the witness who said that he did not have any legal process or authorization to make this search.

"The Court:

"Do I understand that your are moving to strike this testimony?

"Mr. Carr:

"Yes, sir, I move to strike the testimony of the witness with regard to the search of room 609 on Sunday and his statement of what was observed there.

"The Court:

"Not on the ground that you have any legal objection on behalf of your client but just because you think justice requires it?

"Mr. Carr:

"No, Your Honor. Let me state it again, respectfully. I know that in order to make an objection to a search a defendant must claim a proprietary interest. We do not assert that. Therefore, we cannot object. I did not raise that ground.

"But to search another person's home or possession or person is not binding on us in my respectful opinion and it is irrelevant and immaterial. And I am objecting on the basis that this search is irrelevant and immaterial so far as Armada is concerned and on that basis I feel the objection is legal and valid."

The court overruled that objection and it is not further pursued on this appeal.

The surveillance continuing, on the evening of Sunday, July 16, Agent Michael A. Romano was called in to assist. Agent Knierin briefed him on the situation. Nothing happened that evening. On Monday morning, July 17, Mrs. Bostizano left the hotel on foot. After about 25 minutes, she returned at about 10:50 or 10:55 A.M. She asked the bell captain of the hotel, George Gunn, to come to her room and get her baggage. Gunn put the larger suitcase on his truck, and he and Mrs. Bostizano proceeded to the lobby and to the hotel's south exit. Some man picked up the suitcase and handed Gunn a dollar tip. The doorman, Robert Nolen, who had been alerted by Agent Doughney, had seen Armada drive into the circular drive, onto which

the hotel's south exit opens, about 15 minutes before Mrs. Bostizano and Gunn arrived with the suitcase. Nolen saw Armada take the suitcase from the truck and place it in the trunk of his car.

Shortly after the car pulled out Nolen had a conversation with Agent Doughney which he related as follows:

> "Well, he said it was just too bad that these people got away, and I said, 'I have made a notation of the make of the car and the license number. If this will help you, here it is.' So then he picked it up and handed it to another agent and another agent called the city police over my phone at the desk."

The agent's call to the Police Department was at about 11:00 A.M. to put in an "all points bulletin" on the car. Several of the agents joined in the search for the car. About an hour later, Armada again drove into the circular drive, parked his car, and alighted. As he drove up, the doorman Nolen told Agent Doughney, "here comes your party now." Doughney stepped back into the hotel lobby and informed Agent Romano. Romano accosted Armada, exhibited his credentials and advised him that he was a federal officer. According to Armada's testimony,

> ". . . . He was looking for me on the sidewalk and I was standing there close to my car. And he said, 'Are you the owner of that car?' I said 'Yes, sir, I am.' And he said, 'Where did you take the suitcase the lady gave you?' And I said, 'I

took it nowhere. I was supposed to take it to be repaired but it is right there in the car.' So he said—well, after he produced the identification—he said, 'Where is your gun?' And I said, 'What do I need a gun for?' And he said, 'You are right.' So he said, 'Don't you move. Just open the car. Let's see the suitcase and stay there and don't move and nobody gets hurt.' "

Armada opened the trunk of the car and Romano, with Doughney standing by, made a cursory examination of the suitcases, the smaller suitcase being inside the larger, without finding the cocaine. He then called for Agents Fickie and Knierin to come down to the car. The trunk lid was again lifted and Agent Fickie located the false bottom in the smaller suitcase containing the two plastic bags with the white substance, later identified at the trial as cocaine. Armada was then placed under arrest.

The search was not incident to the arrest because Armada was arrested only after the search had been completed. There is no contention on appeal that Armada voluntarily consented to the search. The Government's position is simply that it was reasonable for the customs agents to search the automobile in a state of mobility without a search warrant, based only on probable cause to believe that it contained the cocaine which was subject to seizure and destruction; that such a search is not violative of the Fourth Amendment which protects against *unreasonable* searches and seizures. We agree.

The search of Mrs. Bostizano's hotel room in which the cocaine was first discovered was not an invasion of Armada's privacy. He has no standing to raise and does not in fact question the legality of that search. See *Jones v. United States*, 1960, 362 U.S. 257, 261, et seq.

Before making the search of the automobile, the agents had information which constituted probable cause to believe the suitcases contained cocaine, and Armada had admitted the suitcase "is right there in the car." Unless Armada was arrested or the car was seized, the automobile could readily be moved.

The cocaine was contraband. 49 U.S.C.A. §781(b)(1). The automobile used for its transportation was subject to be seized and forfeited. 49 U.S.C.A. §782. The rule of the *Carroll* case is applicable:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid."

Carroll v. United States, 1925, 267 U.S. 132, 149. See also, *Husty v. United States*, 1931, 282 U.S. 694, 700; *Brinegar v. United States*, 1949, 338 U.S. 160, 175; compare *United States v. Di Re*, 1948, 332 U.S. 581, 584, 585.

Appellant argues that the decision in *Carroll v. United States*, *supra*, is limited by the *Di Re* opinion, *supra*, 332 U.S. at 584, to searchers and seizures for the enforcement of the National Prohibition Act. While the language of *Di Re* lends some plausibility to that contention, the decision did not so hold, and that *Carroll* is not so limited is now well established. *Howard v. United States*, 5 Cir. 1962, 307 F.2d 350; *Bruner v. United States*, 5 Cir. 1961, 293 F.2d 621; *Patenotte v. United States*, 5 Cir. 1959, 266 F.2d 647.

The cocaine in the present case was as thoroughly contraband and rendered the vehicle just as much subject to seizure and forfeiture as did the liquor in the *Carroll* case. Compare *Sirimarco v. United States*, 10 Cir., 1963, 315 F.2d 699; *Ted's Motors, Inc. v. United States*, 8th Cir. 1954, 217 F.2d 777.

The appellant argues that the hour during which there was an "all points bulletin" on the car gave time to secure a search warrant. The circumstances, however, called for pursuit before disposition could be made of the contraband cocaine. The officers could not foresee that the pursuit would last for an hour, nor that Armada, unaware of the surveillance, would return to the hotel.

The appellant relies on *Rent v. United States*, 5 Cir., 1954, 209 F.2d 893, 897, and argues that "when the automobile was finally located and searched, it was parked in the hotel's circular drive, the automobile was not occupied and the keys were in the possession of the defendant who was approximately thirty-five feet from the automobile. Prior to the search and seizure the two agents ap-

proached the defendant, and at that time he was no longer free to drive away." The circumstances in *Rent* were entirely different. Here Armada was free to drive away unless he was arrested or the automobile was seized or searched. What was said in *United States v. Walker*, 4 Cir., 1962, 307 F.2d 250, 252, applies here:

> "Appellant would limit *Carroll* to those cases where the vehicle is in transit on a public road or highway. However, this argument ignores the basic reason for the Carroll doctrine—that a vehicle by its very nature can be quickly moved out of the locality or jurisdiction in which the warrant might be sought and law enforcement thereby frustrated. This very practical consideration is present whether the vehicle is in transit on the open road or parked."

Under all of the facts and circumstances of the case, we agree with the district court that the search of the automobile and its contents was reasonable. The judgment is therefore

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By CLARA R. JAMES
Deputy

Sep. 23, 1963

New Orleans, Louisiana

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19596

D. C. Docket No. 12,215-M-Civil

VINCENT IGLESIAS ARMADA,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before Rives, Lewis* and Bell, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of

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* Of the Tenth Circuit, sitting by designation.

the record from the United States District Court for the Southern District of Florida, and was argued; by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 10, 1963

Issued as Mandate:

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19596

VINCENT IGLESIAS ARMADA,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(SEPTEMBER 12, 1963)

ON PETITION FOR REHEARING

Before RIVES, LEWIS* and BELL, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above-styled and numbered cause is hereby

DENIED.

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* Of the Tenth Circuit, sitting by designation.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	12

CITATIONS

Cases:	
Brinegar v. *United States*, 338 U.S. 160	6
Carroll v. *United States*, 267 U.S. 132	5, 7
Giordenello v. *United States*, 357 U.S. 480	8
Husty v. *United States*, 282 U.S. 694	6
Jones v. *United States*, 362 U.S. 257	9, 10
Lotto v. *United States*, 157 F. 2d 623, certiorari denied, 330 U.S. 811	8
McDonald v. *United States*, 335 U.S. 451	11, 12
Nardone v. *United States*, 308 U.S. 338	8
Scher v. *United States*, 305 U.S. 251	6
Schnitzer v. *United States*, 77 F. 2d 233	8
Silber v. *United States*, 370 U.S. 717	8
United States v. *Atkinson*, 297 U.S. 157	8
United States v. *Di Re*, 332 U.S. 581	8
Wong Sun v. *United States*, 371 U.S. 471	9
Statutes:	
21 U.S.C. 174	2
26 U.S.C. 4704(a)	2

717-667—61

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 614

VINCENT IGLESIAS ARMADA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (R. 124–126) and the court of appeals (Pet. App. 1–12) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1963 (R. 148; Pet. App. 13–14), and a petition for rehearing was denied on September 12, 1963 (R. 170; Pet. App. 15). On October 7, 1963, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 11, 1963. The petition was filed on November 12, 1963.[1] The

[1] The petition was timely since November 11 is Veterans Day, a national holiday.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether government agents, having probable cause to believe that an automobile contained contraband, could search it when they found it parked, and with petitioner standing beside it, in the driveway of a hotel.

2. Whether petitioner, who disclaimed standing to object in the courts below and denied that he had any interest in the premises or property observed, may now complain of the search of the room of an absconded co-defendant.

STATEMENT

Petitioner was convicted, after a jury trial in the United States District Court for the Southern District of Florida, on three substantive counts charging that on or about July 17, 1961, he and a co-defendant, Hilda Nora Bostizano, concealed more than four pounds of unlawfully imported cocaine, in violation of 21 U.S.C. 174 (count 3); facilitated the transportation of the drug, in violation of 21 U.S.C. 174 (count 4); and purchased the drug not in or from the original stamped package, in violation of 26 U.S.C. 4704(a) (count 5) (R. 4–7).[2] Petitioner was also convicted on count 6, which charged that from July 15 to July 17, 1961, he and Mrs. Bostizano conspired to commit the substantive offenses. Mrs. Bostizano

[2] Counts one and two charged Mrs. Bostizano alone with illegal importation of the drug on July 15, 1961.

failed to appear for trial and her bond was forfeited (R. 13). Petitioner was given concurrent sentences of imprisonment for five years and was fined $2,500 on each count (R. 8–10).

Petitioner's pre-trial motion to suppress the narcotics found in his car on July 17, 1961 (R. 131–132), was denied without prejudice to renewal at the time of trial (R. 14). The motion was renewed when the case was called for trial and the court heard extensive testimony before denying it again (R. 14, 124–126). That testimony may be summarized as follows:

On July 15, 1961, at about 9:30 p.m., customs agent Knierin learned from two telephone conversations with a customs inspector at Miami International Airport that a suspect, Mrs. Bostizano, a known associate of petitioner, had left the baggage room without being stopped by government agents and was on the street (R. 95, 99). Agents Knierin and Fickie went to the office of the United States Customs Agent where they examined the government file on petitioner and Mrs. Bostizano (R. 100–101). The agents traced Mrs. Bostizano to Room 609 of the Everglades Hotel, and they rented a room across the hall (R. 102–103). On July 16 at about 3:30 p.m., without a search warrant, the agents entered Mrs. Bostizano's hotel room, searched a large and small suitcase,[3] and found two plastic bags containing what appeared to be cocaine in a false bottom of the small suitcase. The agents did not remove the bags and glued the fabric back to

[3] The agents had a description of the two suitcases before they came through customs inspection (R. 64).

the false bottom (R. 103–108, 111). Agent Knierin discussed what he had seen in the suitcase with agents Fickie, Romano, and Doughney (R. 108–109, 115). Agent Knierin also reported to agent Romano that the file revealed that Mrs. Bostizano had been placed on the suspect list because of association in South America with dealers who produced cocaine and with petitioner Armada. It had been long suspected that petitioner was involved in bringing cocaine from South America to the United States by use of women couriers (R. 109–111).

On the morning of July 17, 1961, Mrs. Bostizano told the hotel bellman that she wanted her suitcase repaired and asked that he bring it down to the lobby (R. 19–23). The doorman saw petitioner pick up the suitcase, place it in the trunk of his car, and drive off with Mrs. Bostizano (R. 48–50). The doorman gave an agent the license number and make of the car, the police put out an "all points" bulletin at about 11:00 a.m., and several agents joined in the search for the car (R. 55, 115–117). Petitioner returned to the hotel in his car about an hour later. The doorman told agent Doughney, "Here comes your party now," and Doughney informed agent Romano of this (R. 35, 55–56, 115). At about 12:15 p.m., Romano identified himself to petitioner, who was standing in the driveway, asked what petitioner had done with the suitcase, and whether he would open the trunk of his car. Petitioner stated that the suitcase was in the car and opened the trunk (R. 27–28, 36–37, 83–84). He said, "Everything that is in the trunk of

the car is mine" (R. 29). Romano and Doughney searched the two suitcases, the smaller of which was inside the larger, but discovered nothing (R. 29, 37–39, 41–42). Agents Fickie and Knierin were called. Fickie discovered in the false bottom of the small suitcase the two plastic bags containing the white substance, later identified at the trial as cocaine (R. 29–30, 32, 43, 67, 78). Petitioner was then placed under arrest (R. 30, 43, 68–69, 72).

With respect to the testimony describing the search of Mrs. Bostizano's room, petitioner's counsel stated that he realized that he could not object to the search on behalf of petitioner without claiming a proprietary interest, which he did not assert, but that "some manner of objection" ought to be available to petitioner. He moved that the testimony as to what was observed in the room be stricken as "not binding on us [and] * * * irrelevant and immaterial." The court denied the motion (R. 111–113; see R. 128).

Petitioner testified on direct examination that Mrs. Bostizano put her suitcase in his car because she wanted the handle fixed and that he did not know what was in it (R. 81–82). When he told the agents everything in the car was his, he did not mean to refer to the suitcase since the agents already knew that it was hers (R. 84).

ARGUMENT

1. This Court held in *Carroll* v. *United States*, 267 U.S. 132, that law enforcement officers may search automobiles, as well as other means of transportation, for contraband on the basis of probable cause without

a search warrant. Accord, *Brinegar* v. *United States*, 338 U.S. 160; *Husty* v. *United States*, 282 U.S. 694; *Scher* v. *United States*, 305 U.S. 251. The district court found that probable cause existed (R. 125) and the court of appeals agreed (Pet. App. 9–12). Petitioner, however, contends (Pet. 11–12) that, even if there was probable cause for the search of his automobile, the search without a warrant was invalid because the car was not in motion, having come to a stop in the driveway of the hotel when he returned there after having left with the suitcases.

As the courts below pointed out (R. 124–125; Pet. App. 11–12), the agents had no way of knowing how long petitioner intended to leave his car in the driveway. Unless the agents stopped the automobile, took the keys, or arrested petitioner, the car might have been gone long before the agents could obtain a warrant. A car does not lose its character as a movable vehicle just because it comes to a temporary stop. Thus, in *Scher* v. *United States*, this Court cited the *Carroll* decision in upholding the search of an automobile parked in the suspect's garage, made without a warrant on probable cause, when the suspect was approached as he was leaving the automobile. Except that the car was at a hotel rather than his own home, the circumstances in this case are virtually identical. See also *Husty* v. *United States*, *supra*, 282 U.S. at 701.

2. In the court of appeals, as in the district court, petitioner failed to complain of the search of Mrs.

Bostizano's hotel room on July 16, 1961.[4] His sole contention was that the search of his car on July 17 was not justified under the *Carroll* case. Petitioner now asserts (Pet. 7–10) for the first time in this Court that the narcotics seized in the search of his car should have been suppressed because the search of Mrs. Bostizano's room was illegal. He reasons that the search of his own automobile was invalid because part of the probable cause on which the agents acted in searching the car was derived from their search of Mrs. Bostizano's room. The underlying and essential premise of this argument is that petitioner has standing to challenge the validity of the search of Mrs. Bostizano's room.

Petitioner's contention must be rejected because it was not the basis of his motion to suppress in the district court. His only objection to the testimony concerning the agents' observations in the course of their search of Mrs. Bostizano's room was that it was "irrelevant and immaterial" to the issues at the trial (R. 113, 128). That argument raised a purely legal question. On the other hand, petitioner's belated claim that the search of the room was invalid depends on the answer to a factual question: whether petitioner had an interest in the room, the suitcase, or the narcotics at the time the room was searched. If he had none, petitioner would clearly have had no standing to challenge the search of the room.

[4] The court of appeals stated (Pet. App. 10): "He has no standing to raise and does not in fact question the legality of that search. See *Jones* v. *United States*, 1960, 362 U.S. 257, 261, *et seq.*"

Issues may be raised for the first time on appeal only in exceptional cases where the error is clear. *E.g., Silber* v. *United States,* 370 U.S. 717; *United States* v. *Atkinson,* 297 U.S. 157, 166. More pointedly, as we have seen, the error here, if there be any, is not clear since factual issues bearing upon the question of his standing were not presented to the district court or resolved by it. It is well settled in cases involving search and seizure that if a party never had the opportunity to present evidence on certain issues because the other party failed to present them in the trial court, the latter is foreclosed by his failure. *United States* v. *Di Re,* 332 U.S. 581, 588; *Giordenello* v. *United States,* 357 U.S. 480, 487–488. These principles are particularly applicable to new contentions raised by the defendant here since the burden of proof is on the one challenging the legality of a search and seizure. *Lotto* v. *United States,* 157 F. 2d 623, 626 (C.A. 8), certiorari denied, 330 U.S. 811; *Schnitzer* v. *United States,* 77 F. 2d 233, 235 (C.A. 8); cf. *Nardone* v. *United States,* 308 U.S. 338, 341. It is unnecessary to go further.

Assuming that petitioner could attack the constitutionality of the search of Mrs. Bostizano's room in this Court for the first time, it appears that there are two bases on which petitioner might conceivably assert standing. First, he could have had a property interest in the room when the search took place, in the suitcases which were there, or in the narcotics themselves. For example, it would have been sufficient if petitioner had been present as a guest in

Mrs. Bostizano's room at the time of the search. *Jones* v. *United States*, 362 U.S. 257, 265–267. Second, a defendant has standing to challenge the search and seizure of narcotics without alleging that they are his, when such an assertion would be an admission of the crime of which he is charged. "The same element * * * which has caused a dilemma, *i.e.*, that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged." *Jones* v. *United States*, *supra*, 362 U.S. at 263. But, as this Court made clear in *Wong Sun* v. *United States*, 371 U.S. 471, 492, the *Jones* decision did not confer standing to attack a search upon one whose right of privacy of person or premises had not been invaded.

Petitioner has satisfied neither basis for standing. First, at the hearing on his motion to suppress, his counsel said that petitioner was not asserting any interest in Mrs. Bostizano's room (R. 111–113, 128). Petitioner clearly indicated at the hearing that the suitcase was Mrs. Bostizano's and said that he did not know what was in it (R. 81–82). Petitioner did not indicate at any time during the hearing that he had any interest in the room, the suitcases, or the narcotics. The government was under no obligation to disprove that which was never claimed.

As to the second criterion for standing, it is true, as petitioner argues (Pet. 7–9), that, if the narcotics had been seized in the search of Mrs. Bostizano's

room on July 16 *and* if petitioner had been charged with their possession on July 16, he could have had standing to challenge the legality of the search under the *Jones* decision. Petitioner would then have been confronted with the dilemma which the *Jones* decision removed—if he admitted possession of the narcotics in order to challenge their search and seizure, he would likewise have been admitting that he was guilty of the crime charged. However, the dilemma would exist only if, as in *Jones,* petitioner moved to suppress without expressing whether he had or did not have any interest in the narcotics. Here, in contrast, as we have seen (p. 9), he affirmatively indicated that he had no interest in them. Since petitioner acknowledged that his interests were not involved in the search of the room, he has no standing to challenge it.[5]

Petitioner also argues (Pet. 10–11) that he should have standing to object to the search because Mrs. Bostizano, if she had appeared for trial, would have

[5] We also note that petitioner was not charged with possession of the narcotics on July 16. The substantive counts (3, 4, and 5 (R. 4–5)) charged that the offenses were committed "on or about July 17, 1961." Although count 6 charged a conspiracy between petitioner and Mrs. Bostizano beginning on July 15, the date of the illegal importation, and continuing through July 17, petitioner was not charged with conspiring with Mrs. Bostizano to import cocaine. The offenses charged in the conspiracy count were to receive, conceal, and facilitate the transportation of the unlawfully imported cocaine and to barter, sell, and transfer it without the required order forms. The only overt acts charged related to the events of July 17, the day of the transfer from Mrs. Bostizano to petitioner, *i.e.*, after the search of Mrs. Bostizano's room.

had standing to move to suppress testimony by the agents as to what they saw in her room. *McDonald* v. *United States,* 335 U.S. 451, 456, upon which petitioner relies, held, to be sure, that the conviction of two co-defendants jointly tried must be reversed where a motion to suppress and return evidence filed by a defendant with standing was erroneously denied. This holding does not support petitioner's contention for two reasons.

First, the holding in *McDonald* depends upon the fact that "[i]f the property had been returned to McDonald, it would not have been available for use at the trial." *Ibid.* Thus, the evidence could not have been used by the government against the defendant without standing, even if the defendant without standing was tried separately. Here, in contrast, the cocaine was contraband which was not returnable to Mrs. Bostizano even assuming that Mrs. Bostizano moved to suppress on the ground that it was illegally seized and this motion was granted. It therefore would have been available for use against petitioner at a separate trial.

Second, even if *McDonald* is construed more broadly—that, whether the evidence is returnable or not, the government cannot benefit as to one defendant from the trial court's erroneous ruling on another defendant's motion—petitioner's contention is without merit. *McDonald* does not hold that a defendant otherwise without standing acquires it because another defendant possesses it, so that the former might independently move to suppress even though the defendant with standing chose for some reason not to do so.

Consequently, *McDonald* does not support petitioner's contention that he had standing because Mrs. Bostizano might have had a valid claim if she had appeared for trial.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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